

November 14, 1997

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E9700688**

GARY REMLINGER/SCARSELLA BROS., INC.
Appeal from Notice and Order

Location of Violation: 32418 Northeast 24th Street

Appellants: Gary Remlinger *and* Frank R. Scarsella
P.O. Box 177 Scarsella Brothers, Inc.
Carnation, WA 98014 P.O. Box 68388
Seattle, WA 98168-0388

Both Appellants represented by:

Marvin Taylor
P.O. Box 1225, Issaquah, WA 98027
Telephone: (425) 837-0991 Facsimile: (425)-837-0992

Department: Department of Development and Environmental Services
Represented by: **Fred White**, Site Development Services
900 Oakesdale Avenue SW, Renton, Washington 98055-1219
Telephone: (425) 296-6640 Facsimile: (425) 296

SUMMARY OF RECOMMENDATIONS:

Division's Preliminary:	Deny the appeal
Division's Final:	Deny the appeal
Examiner:	Appeal denied

PRELIMINARY MATTERS:

Issuance of Notice and Order:	July 8, 1997
Appeal received from Gary Remlinger:	July 11, 1997
Appeal received from Scarsella Brothers, Inc:	July 18, 1997

EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	August 19, 1997
Hearing Opened:	October 14, 1997

Hearing Continued:
Hearing Adjourned/Administrative Continuance:
Hearing Closed:

October 15, 1997
October 15, 1997
October 27, 1997

ISSUES ADDRESSED:

- Landfill exceeding exemption standard

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. Notice and Order Issued. On July 8, 1997, King County Department of Development and Environmental Services (hereinafter, “the Department” or “DDES”) issued a Notice and Order to Washington State Department of Transportation (“WSDOT”), and to Gary Remlinger and Scarsella Brothers, Inc (hereinafter “the Appellant[s]”). The Notice and Order charges WSDOT and the Appellants with “filling in excess of 100 cubic yards and/or three feet in depth without a valid grading permit”, citing KCC 16.82.060. To bring the property into compliance, the Notice and Order commands the following:
 - Stop work immediately;
 - Apply for and obtain a valid clearing/grading permit, with application to be submitted before August 8, 1997; *and/or*
 - Submit an abatement plan; that abatement plan shall commence within ten days following Department approval (or in accordance with a schedule specified by the Department, whichever is greater);
 - Pay an investigation fee as provided in KCC 27.12.010.E, the amount to be determined in conjunction with review of the plans or permit identified above.
2. WSDOT Dismissed. Having conducted a pre-hearing conference on August 19, 1997, King County Hearing Examiner James N. O’Connor dismissed WSDOT from these proceedings on August 22, 1997, based upon an agreement between WSDOT and the Department. That agreement is contained in this hearing record as exhibit no. 3.
3. Appeals Filed. On July 11, 1997, the Department received an appeal from Gary Remlinger of Remlinger Farms and on July 18, 1997, from Frank Scarsella of Scarsella Brothers, Inc. These two appeals are addressed in this review.
 - In his appeal, Mr. Remlinger states that the activity at issue was “soil preparation for planting about 1,000 Christmas trees.” In addition, Appellant

Remlinger seeks \$3,639.88 for reimbursements of costs and fees related to defending the “soil preparation” action which, Appellant Remlinger argues, “most likely stems from a vindictive or harassing attitude by at least one King County employee.”

- Appellant Scarsella, in his appeal, argues that no permit was necessary because the action at issue was “soil preparation for planting about 1,000 Christmas trees.”

Consequently, the Appellants’ appeal in this case initially rested upon two points:

A. Whether fill in excess of exempt amounts was deposited on the subject property within unincorporated King County. This issue is defined in Examiner O’Connor’s August 22, 1997 pre-hearing order (exhibit no. 20).

B. Whether the Appellants conducted (only) “soil preparation” in a manner which is exempt from grading or clearing regulations. See finding no. 5, below.

4. Quantity and/or Fill Depth. The parties have provided extensive testimony and evidence regarding the issue of whether the fill was deposited on the subject property without permit authorization. Much of this testimony and evidence conflicts, with the Appellants’ representative accusing Department witnesses of perjury. The gathering of the evidence presented below was further hampered by the following:

- Neither Appellant Scarsella nor his on-site foreman appeared. Instead, Appellant Scarsella allowed himself to be represented by Marvin Taylor. Thus, Appellant Scarsella’s statement to the appeal record (exhibit no. 31D) could not be cross-examined.
- Appellant Remlinger would not permit the Department’s employees to enter the property until ordered to do so by Examiner O’Connor pursuant to his August 22, 1997 pre-hearing order, over two months past the period in May when the violation is alleged to have occurred. During the period extending from the Notice and Order issuance (July 8, 1997) until the mutually arranged inspection date of September 10, 1997 (pursuant to Examiner O’Connor’s order), the Appellants executed a variety of changes to the premises: removal of extensive quantities of the deposited material at issue; Christmas tree planting; and, mulching.

Regarding the issue of whether the Appellants deposited fill on the site at issue in an amount or depth which exceeds 100 cubic yards or three feet, the findings set forth below are relevant.

A. A DDES employee (a senior ecologist with the Department) resides near Remlinger Farms. Acting in a private capacity as a concerned neighboring resident, she filed the complaint which eventually resulted in these proceedings. Ms. Casey testifies that she is uncertain as to the number of trucks which passed her home to dump on the Remlinger property, but that during those days she was home during the week before May 12, 1997, and during the week of May 12, 1997, a truck passed her home, going either west or east (that is, empty or full) every fifteen minutes “all day.”

B. Tim Wasson, WSDOT site inspector, personally saw at least twenty trucks dump on the site at issue. The Appellant argues that Wasson did not see all of the trucks dump and that there were 248 total truck loads, suggesting that the other 228 truck loads must have been taken elsewhere.

C. No party in this proceeding has testified to seeing the disposition of the other 228 truck loads as it actually occurred. Witness Wasson, whose responsibility was project oversight, confidently states they all went to the site at issue. The Appellants suggest that these truck loads of wetland excavation spoils were stored at two other sites within the Remlinger Farm property, sites properly authorized and permitted by the City of Carnation. In a post hearing motion, Appellant's representative Taylor suggests that this Examiner "appeared to have exceeded the scope" of the Notice and Order by expressing curiosity regarding where the excavated wetland spoils must have been deposited if they were not deposited at the site at issue.

D. Witnesses Wasson and Tiffany saw no fill at the alternative City of Carnation sites. The Appellants argue that Wasson did, indeed, see the deposited wetland excavation spoils on one of those properties, or at least some of it, but thought it was topsoil instead. The Appellants also argue that Tiffany did not look in the correct place(s). WSDOT project inspector Wasson responds that he knows very well the difference between topsoil and State Route (SR) 202 wetland excavation spoils.

E. Although permits were obtained from the City of Carnation for the two other sites discussed by the parties at length in this proceeding, no permit was obtained for the site at issue. Appellant Remlinger testifies that he only wanted slightly less than 100 cubic yards of the wetland clay for "topsoil" preparation for Christmas tree planting. Unfortunately, testifies Remlinger, about 1,000 cubic yards too much were inadvertently dumped. The dumping, which partially covered a farm road below, was immediately removed at Remlinger's direction by Scarsella trucks assisted by a Remlinger employee.

F. Witnesses Tiffany and Smith dug two test pits in the deposited material at issue; one at 1.8 feet deep, the other at 2.45 feet deep. As a result of these test pits, witnesses Tiffany and Smith testify as to the characteristics of the deposited material: identical to that material removed from the WSDOT SR 202 project. Specifically, the deposited soils upon the site at issue, a hillside ranging in slopes from 3:1 to 4:1, are hydric soils, mottled sufficiently to indicate lack of oxygenation typical of wetland soils. In addition, these soils contain decomposing ferns, cattails and other wetland vegetation, some of which have since regrown along the hillside. See photographs in evidence. Tellingly, these soils are deposited on top of well oxygenated native soil.

The Appellants argue that the test pit findings exceed Examiner O'Connor's pre-hearing order to determine the "extent of fill."

G. On May 30, 1997, Tiffany took a photograph of the site at issue from a nearby County trail. The photograph is difficult to read with respect to the presence of specific types of vegetation. There are two small pioneer alder trees on the site at issue. The Appellant argues that these trees are apparent in the May 30, 1997 photograph; Tiffany contends that the photograph is too hazy to ascertain the presence of those trees for certain. Having reviewed both the photograph and a photocopy machine enlargement, this Examiner (using a magnifying glass) is unable to examine that photograph with sufficient certainty to resolve this portion of conflicting testimony.

However, the May 30, 1997 Tiffany photograph clearly shows a dark area containing freshly deposited spoil and a green area covered by grass. Neither the Department nor the Appellant has clearly established when that grass (predating May 30) might have been planted (or *if* it was planted).

H. Over half of the Christmas trees planted on the soil material at issue have died. Considering

that the trees were planted in summer (rather than in winter, the correct planting period according to Appellant Remlinger's expert witness), and considering finding no. 4.F, above, the high morbidity rate for these trees should not be surprising.

I. The Scarsella trucking trip sheets indicate that all of the excavated material went to the Remlinger Farm. Both the Department and the Appellants seem to agree that the term "Remlinger Farm" refers to the site at issue. However, the Appellant argues that, in some manner the trip logs are misleading. It should be noted, however, that all three sites (the site at issue and the two Carnation sites) are owned by Appellant Remlinger. Consequently, the value of the trip logs are minimal.

J. Exhibit no. 21 contains soil scientist Grant Smith's calculations regarding the extent of fill. The exhibit takes note of an area containing "previously planted Christmas trees" and excludes that area from calculation. Based upon the test pits described above and Mr. Wasson's recollection that the fill was approximately ten feet deep in some locations when he saw it during the filling, Smith assumed an average depth of 4.75 feet. Based upon a dotted cell grid commonly used for field area estimates, Smith calculated the area of the land fill to be approximately .71 acres. No one has contested his calculation of area. Based on these assumptions, he calculated that approximately 5,460 cubic yards were placed on the property; or, approximately 5,360 cubic yards more than that amount permitted to be deposited by KCC 16.82 without a permit. If Smith had *over-estimated both the area and the depth by twice the actual amount of each*, then approximately 1,360 cubic yards would have been deposited¹; approximately 1,260 yards exceeding the amount which KCC 16.82 allows to be deposited without permits. Then, *if that amount were twice the actual amount*, then approximately 680 cubic yards would have been deposited, approximately 580 yards exceeding the amount allowed to be deposited without a permit.

K. The Appellant's representative, and others associated with him or Appellant Remlinger, stuck a metal prong, approximately four feet long, into the site at issue in several locations. Several photographs of people shoving this prong into the earth were taken and offered as exhibits. The Appellant's representative argued that these photographs demonstrated how hard the surficial soils of the site at issue are, thereby suggesting they had been in that same location for a very long time. On the other hand, soils experts from the Department testified that, when wetland soils with a high clay content and minimal oxygenation bake in the sun during summer, they get hard.

5. Agricultural Exemption Issue. Examiner O'Connor's August 22, 1997 pre-hearing order, paragraph 2, excludes the "agricultural exemption" argument from this review, limiting the review solely to whether fill in excess of exempt amounts was deposited on the subject property within unincorporated King County. The Department's investigation report and testimony based upon its September 10, 1997 site visit confirms the wisdom of that action. The agricultural sense of depositing any amount of clayey ("gleyed") wetland excavation spoils for use as hillside soil preparation for planting conifers is unfathomable. Time has demonstrated the correctness of such doubt. As of September 10, 1997, approximately half the trees had died, yet those portions of the hillside receiving any reasonable amount of moisture have sprouted horsetails, cattails, reed and canary grass and other wetland vegetation.
6. Should any portion of the following conditions be construed as a finding, it is adopted and incorporated here as such.

¹ Using the same methodology described in exhibit no. 21

CONCLUSIONS:

1. The record incontrovertibly demonstrates that more than 100 cubic yards were hauled to the subject property and placed upon the site at issue. The soil types and soil type differentiation on the site demonstrate a substantial importation of high-clay-content soil with wetland vegetation and components. See, particularly, finding nos. 4.F and exhibit no. 31, and testimony of Wasson, Smith and Tiffany. The amount of that importation and deposition of wetland excavation spoils clearly exceeded 100 cubic yards. See *inter alia* finding nos. 4.J and 4.B. This activity occurred in May, 1997. See finding no. 4A. No permit was issued which authorized such activity. See finding 4.E. KCC 16.82.060 prohibits the deposition of 100 cubic yards or more on a property in unincorporated King County without appropriate permit(s). The Appellants failed to obtain any permit for the site at issue.
2. These conclusions and the order which follows below are not intended to indicate that a farmer cannot place wetland spoils on his property. He is certainly entitled to do so with proper permits. In this case, however, the preponderance of evidence demonstrates that Appellants Remlinger and Scarsella did not comply with King County permit requirements at the site at issue in these proceedings.
3. No agricultural exemption applies in this case. The record is devoid of evidence or argument which would suggest otherwise. Nor is there any evidence or argument in this record which would support the deposition of wetland spoils as a forest practice. This conclusion, however, is redundant in as much as the issue of agricultural exemption was excluded from this review by Examiner O'Connor's August 22, 1997 pre-hearing order.
4. Any portion of findings nos. 1 through 6, above, which may be construed as a condition is hereby adopted and incorporated as such.

DECISION:

The appeal is DENIED.

ORDER:

- A. The Department shall implement any of those provisions of its July 8, 1997 Notice and Order which it deems administratively appropriate.
- B. The Appellant shall not be required to pay any civil penalties which would have accrued to this date if the appeal had not been filed. Those penalties have been stayed by the appeal. However, the Appellant shall pay those Departmental investigation and enforcement costs which have accrued to this date; PROVIDED, however, that the Department shall provide the Appellant a detailed accounting of those investigation and enforcement costs, including the costs incurred by the Department by participating in these appeal review proceedings.
- C. The Department shall set new compliance deadlines for Appellants Scarsella and Remlinger, in as much as the ones contained in the appealed Notice and Order are now out of date.
- D. Nothing in this order shall be construed as limiting the authority of the Department or the King County Prosecutor to pursue any other remedy otherwise provided by statute or ordinance.

R. S. Titus, Deputy
King County Hearing Examiner

Transmitted this 14th day of November, 1997, to the interested persons indicated on the attached list

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Hearing Examiner make the final decision on behalf of the County regarding code enforcement appeals.

MINUTES OF THE OCTOBER 14, 1997 AND OCTOBER 15, 1997 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E9700688 –
WSDOT/REMLINGER/SCARCELLA CODE ENFORCEMENT APPEAL:

R. S. Titus was the Hearing Examiner in this matter. Participating at the hearing were Gary Remlinger, Tom Wilson, Tim Wasson, Marvin Taylor, Daryl Sherfy, Laura Casey/DDES, Chris Tiffany/DDES, Dale Morimoto/WSDOT, Ben Brown/WSDOT, Valerie Rollis/WSDOT, Fred White/DDES, Chris Tiffany/DDES, and Grant Smith/DDES.

On October 14, 1997 the following exhibits were offered and entered into the hearing record:

- Exhibit No. 1 Letter, dated May 27, 1997, from R.R. Erickson/Washington State Department of Transportation, to Chris Tiffany/King County Department of Development and Environmental Services, with attachments
- Exhibit No. 2 Letter, dated June 9, 1997, from R.R. Erickson/Washington State Department of Transportation, to Chris Tiffany/King County Department of Development and Environmental Services, with attachments
- Exhibit No. 3 Stipulated Agreement for Code Enforcement Case E9700601, between DDES and WSDOT, re: dumping at Remlinger site
- Exhibit No. 4 Applications for Land Clearing, Filling or Grading permits in the City of Carnation, date paid February 28, 1997 and March 3, 1997
- Exhibit No. 5 KCDDDES Notice and Order, dated June 9, 1997, for case no. E9700601
- Exhibit No. 6 Letter, dated June 13, 1997, from Grant Smith, to Gary Remlinger – WSDOT - & Scarsella Brothers
- Exhibit No. 7 Letter, dated June 26, 1997, from Marvin Taylor, to KC DDES
- Exhibit No. 8 Letter, dated June 27, 1997, from Grant Smith/DDES, to Marvin Taylor
- Exhibit No. 9 Letter, dated July 2, 1997, from Marvin Taylor, to KC DDES
- Exhibit No. 10 Letter, dated July 7, 1997, from Marvin Taylor, to KC DDES
- Exhibit No. 11 Letter, dated July 8, 1997, from Grant Smith/DDES, to Marvin Taylor
- Exhibit No. 12 KCDDDES Notice and Order, dated July 8, 1997, for case no. E9700688
- Exhibit No. 13 Memo to DDES file, section #1 dated July 8, 1997, section #2 dated July 9, 1997, from Randy Sandin, re: E9700688
- Exhibit No. 14 Letter, dated July 10, 1997, from A.W. Carter, to Randy Sandin/DDES
- Exhibit No. 15 Letter, dated July 11, 1997, from Marvin Taylor, to Grant Smith/DDES
- Exhibit No. 16 Letter, dated July 11, 1997, from Grant Smith/DDES, to Marvin Taylor
- Exhibit No. 17 Appeal, from Gary Remlinger, dated July 10, 1997, dated received July 11, 1997
- Exhibit No. 18 Appeal, from Scarsella Brothers, dated July 18, 1997

- Exhibit No. 19 Appeal, from WSDOT, dated July 21, 1997, dated received July 22, 1997
- Exhibit No. 20 Pre-Hearing Order, from Office of the Hearing Examiner, dated August 22, 1997, issued by James N. O'Connor
- Exhibit No. 21 Grant Smith/DDES, fill calculations work sheet, dated September 10, 1997, with attachment
- Exhibit No. 22 (Twenty-six 26) color photographs of Remlinger site, taken by Chris Tiffany on September 10, 1997
- Exhibit No. 23 SR202, JCT.244th Avenue NE, Channelization, Biology/Wetland Report, prepared by Charles Plummer/Biologist/WSDOT, dated May 1996,
- Exhibit No. 24 Witness list, dated September 15, 1997, from Marvin Taylor
- Exhibit No. 25 Witness list, dated September 15, 1997, from Fred White
- Exhibit No. 26 Log notes from clearing permit file #L96GL084, dated March 17, 1997 to September 12, 1997
- Exhibit No. 27 Log notes from code enforcement file #E9700688, dated June 24, 1997 to September 10, 1997
- Exhibit No. 28 Copy of closed code enforcement case (C9001442/E90C0719) for grading violation in same location as current case; case resolved by removal of fill and payment of investigation fees
- Exhibit No. 29 DDES, Code Enforcement Section staff report to the Hearing Examiner, prepared for the October 14, 1997 hearing on file no. E9700688
- Exhibit No. 30 Letter, dated October 14, 1997, from Frank Scarsella, to Hearing Examiner, authorizing Marvin Taylor to represent Scarsella at hearing
- Exhibit No. 31 Summary of Gary Remlinger defense, prepared and dated for the October 14, 1997 public hearing on file no. E9700688, with the following attachments:
- 31A. Arial view of Remlinger farm and definition of “farming” from RCW 46.04.183
 - 31B. KC DDES clearing permit, dated February 18, 1997, for Remlinger site
 - 31C. KC DDES Off-Site Disposal Activities for Permit #16582, Scarsella Brothers/Remlinger Farm
 - 31D. Written statement, Frank Scarsella, dated July 29, 1997, with attached map
 - 31E. Photograph of Remlinger Farm site, **fill site**, taken by Chris Tiffany, May 30, 1997
 - 31F. Photograph of Remlinger Farm site, **top of slope**, taken by Marvin Taylor, June 11, 1997
 - 31G. Photograph of Remlinger Farm site, **edge of slope**, taken by Marvin Taylor, June 11, 1997
 - 31H. Written statement, Gary Remlinger, dated July 31, 1997
 - 31I. Written statement, Tom Wilson, dated July 29, 1997
 - 31J. Erik Wickstrom (Wilson’s employee), verification of written statement
 - 31K. Letter, dated June 13, 1997, from Grant Smith/DDES, to WSDOT, and to Scarsella Brothers, with attachment
 - 31L. Letter, dated September 15, 1997, from Fred White/DDES, to Marvin Taylor
 - 31M. Photograph of Remlinger Farm site, **probe of east half of fill site**, taken by Marvin Taylor, October 13, 1997
 - 31N. Photograph of Remlinger Farm site, **probe west of trees/center slope of fill site**, taken by Marvin Taylor, October 13, 1997
- Exhibit No. 32 Written statement (original copy of exhibit no. 31J)

On October 15, 1997 the following exhibits were offered and entered into the hearing record:

- Exhibit No. 33 City of Carnation, Application for Land Clearing, Filling, or Grading Permit, dated paid March 31, 1997 (\$250.), for Gary Remlinger
- Exhibit No. 34 City of Carnation, Application for Land Clearing, Filling, or Grading Permit, dated paid February 28, 1997 (\$1550.), for Gary Remlinger
- Exhibit No. 35 Letter, dated December 9, 1996, from KC Code Enforcement, to Gary Remlinger, re: complaint and possible code violation
- Exhibit No. 36 Photograph, **pumpkin patch**, Remlinger Farm, taken October 14, 1997 by Marvin Taylor
- Exhibit No. 37 Photograph, **site of violation**, Remlinger Farm, taken October 14, 1997 by Marvin Taylor
- Exhibit No. 38 Photograph, **cattail area**, Remlinger Farm, taken October 14, 1997 by Marvin Taylor
- Exhibit No. 39 Photograph, **downhill from cattails**, Remlinger Farm, taken October 14, 1997 by Marvin Taylor
- Exhibit No. 40 Photograph, **view of site from east showing wetland vegetation**, Remlinger Farm, taken October 14, 1997 by Marvin Taylor
- Exhibit No. 41 Photograph, **raspberry field**, Remlinger Farm, taken October 14, 1997 by Marvin Taylor
- Exhibit No. 42 Photograph, **truck observation location**, Remlinger Farm, taken October 14, 1997 by Marvin Taylor

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Exhibit No. 43 2 maps:

- King County Thomas Guide showing area of Remlinger Farm
- King County Streams and 100 Year Floodplains map

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